

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

AMERICAN TRADESMEN, INC.¹

Employer

And

CHICAGO & NORTHEAST ILLINOIS DISTRICT COUNCIL OF CARPENTERS/UNITED BROTHERHOOD
OF CARPENTERS

Petitioner

Case 13-RC-20840

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁴

All full-time and regular part-time carpenters, apprentices, and maintenance employees employed by the Employer out of its location currently located at 6121 Washington Street, Gurnee, Illinois; but excluding foremen, professional employees, technical employees, clerical employees, confidential employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. **In addition, all employees who have been employed for a total of 30 days or more within the 12-month period immediately preceding the eligibility date for the election, or have had some employment in that period and have been employed 45 days or more within the 24-month period immediately preceding the eligibility date, are also eligible.** Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated

payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Chicago & Northeast Illinois District Council of Carpenters/United Brotherhood of Carpenters.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before October 7, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by October 15, 2002.

DATED September 30, 2002 at Chicago, Illinois.

/s/Elizabeth Kinney

Regional Director, Region 13

*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The Petition names the Employer as “American Tradesman/Danvid Corp.”. From the record evidence and as discussed more fully below, I have concluded that the Employer of the petitioned-for employees is American Tradesmen, Inc. and not Danvid Corporation.

2/ The Employer did not appear at the hearing, which was conducted on September 11, 2002, although it received the Petition and Notice of Hearing on August 30, 2002. The Employer’s position prior to the hearing was that it did not employ any carpenters or laborers. The arguments advanced at the hearing by the Petitioner have been carefully considered. Post-hearing briefs in this matter were due on September 18, 2002. On September 20, 2002, the Petitioner’s attorney, who did not represent the Petitioner at the hearing, filed a request for an extension of time, until September 24, 2002, to file briefs. On September 20, 2002, I denied the Petitioner’s request for an extension of time. Nonetheless, the Petitioner’s attorney filed a brief on September 20, 2002. Because the brief was not received until after the time for the filing of briefs had expired, and no extension of time was given, the Petitioner’s brief has not been considered.

3/ The Employer is an Illinois corporation engaged in the building and construction of new residential homes, including houses, condominiums, and townhouses. The record demonstrates that the Employer’s annual gross revenue is approximately \$1.5 million and the Employer purchased approximately \$40,000 worth of building materials directly from the state of Wisconsin. In addition, the Petitioner served the Employer with a subpoena requesting various records necessary to establish the Board’s jurisdiction over it. However, the Employer failed to comply with this subpoena. Since the record establishes statutory jurisdiction, and the Employer refused to provide the subpoenaed material relevant to this issue, I find that it is appropriate to assert jurisdiction over the Employer. *Tropicana Products*, 122 NLRB 121, 123 (1959).

4/ The Petitioner seeks to represent a unit of all full time and regular part time carpenters, apprentices and maintenance workers employed by the Employer.

SUMMARY OF DECISION

I find that the petitioned-for employees, three workers who work as carpenters, apprentices and maintenance workers, are employed by the Employer and constitute an appropriate unit. Specifically, I find that the petitioned-for employees work for American Tradesmen, Inc., (the “Employer”) and constitute an appropriate unit insofar as they share several key communities of interest factors, including hours of work, supervision, contact, and functional integration. I further find that John Onan, the Employer’s foreman, is a supervisor within the meaning of the Act who is, therefore, excluded from the unit because he hires employees, sets their rate of pay and assigns them work.

FACTS

The Employer is engaged in the business of building new residential homes. The President of the Employer is Daniel Riedel. Riedel is apparently also the President of Danvid Corporation, a real estate management company. The Employer employs four individuals who were all working on building townhouses in a development called

Victorian Village, located in Gurnee, Illinois. They include foreman John Onan, and three employees: Jesus Espinoza Garcia, Jose Tello Garcia, and Salvador Chavez.

The employees are paid on an hourly basis, ranging from \$10 an hour to \$20 an hour. The employee making \$20 an hour, Garcia, worked for the Employer for 3 years, beginning in 1995, before relocating to California in 1998. During those 3 years Garcia was paid hourly wages and received W-2 tax forms from the Employer. After returning to Illinois in 2001, Garcia started his own company, Espinoza Construction, in February 2002 and contracted with Riedel to build a house. However, due to problems receiving payments from the Employer, Garcia closed his business, in about May 2002. Thereafter, the Employer's foreman, John Onan, offered Garcia a job working for American Tradesmen, Inc. on a "per hour" basis. Garcia accepting this offer to return to work for the Employer.

Onan also asked Garcia to get other workers to assist them at the Victorian Village project. Accordingly, Garcia solicited two workers, Jose Tello Garcia and Salvador Chavez. Because these two do not speak English, Garcia translated for them when they came to work the first day. On that day, Onan asked them how much they wanted to be paid, based on what they knew. When they both asked for \$15 an hour, Onan instead decided that Tello would receive \$12 an hour and Chavez would get \$10 an hour. This is supported by a time sheet showing each employee's nickname, the number of hours they worked during each day in a two-week pay period, and their respective rates of pay.

For the first two pay periods, Onan gave Garcia a check, with Danvid Corporation's name on it and signed by Riedel. These checks were made out to Garcia and included the amount of wages for all three workers. Garcia was then expected to cash the check and divide it up among the workers according to the rates of pay established by Onan, which he did. However, Garcia objected to this practice, given the obvious tax implications for him, and told the Employer's secretary that he would quit if the practice continued. Since that time, the Employer has paid the employees in cash. When Garcia asked why he was being paid on checks naming Danvid, Onan told him it had been a mistake.

The record demonstrates significant contact and functional integration of the work performed by the petitioned-for employees. Each morning, all three employees report to Onan's home, located in the Victorian Village development, at 7:00 a.m. to receive their daily work assignments. Specifically, Onan tells the men where they will be working and what they will be doing each day. Garcia, being the most experienced, primarily does framing work and installing trim, cabinets and siding. For example, after Onan does the layout of a wall, Garcia constructs it. During this process, Tello and Chavez carry materials to where Garcia is working. Thus, the employees have constant contact with one another and they work together to complete their assignments. In addition, Tello is being trained by Onan as to how to perform this carpentry work. Tello estimated that he spends about 50% of his time building walls and 50% of his time carrying materials and cutting wood. Chavez, on the other hand, only brings materials to the other employees. All three employees work the same hours each day, from 7:00 a.m. to between 1:00 p.m. and 4:00 p.m.

ANALYSIS AND CONCLUSIONS

A. Employer and Appropriate Unit Issues

The employees here went to work for American Tradesmen, Inc. when they were hired by an American Tradesmen, Inc. foreman, John Onan. The mere fact that the employees were paid from a check listing Danvid Corporation, coupled with the fact that Danvid Corporation has the same company president as American Tradesmen, Inc., Daniel Riedel, does not establish either single integrated enterprise or joint employer status regarding these entities. Accordingly, I find that the petitioned-for employees are employed by American Tradesmen, Inc.

In determining whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as: wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. See e.g., *The Boeing Co.*, 337 NLRB No. 24 (2001) (Citations omitted). Moreover, it is well-settled that the unit need only be an appropriate unit, not the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950), *enfd.* on other grounds 190 F.2d 576 (7th Cir. 1951).

Here, the record demonstrates that the petitioned-for employees work side by side, at the same location, under the same supervision, and under common working conditions. Accordingly, I find that they to share a sufficient community of interest to constitute an appropriate unit.

B. Supervisory Status Issue

Section 2(11) of the Act defines a “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The exercise of any one of these types of authority is sufficient to confer supervisory status; however, it is well settled that such authority must be exercised “with independent judgment on behalf of management and not in a routine or sporadic manner” (Citation omitted), *International Center of Integrative Studies/The Door*, 297 NLRB 601 (1990). The exercise of some supervisory authority “in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” (Citation omitted). *Bowne of Houston, Inc.* 280 NLRB 1222, 1223 (1986); *Clark Machine Corp.*, 308 NLRB 555 (1992). In each case, the differentiation must be made between the exercise of

independent judgment and the routine following of directions; between effective recommendation and the forceful suggestion; and between the appearance of supervision and supervision in fact. See *Chevron Shipping Co.*, 317 NLRB 379 (1995); *J.C. Brock Corp.*, 314 NLRB 157 (1994).

In the instant case, I find that Onan is a supervisor. The record demonstrates that he hired all three employees and determined their rates of pay. The record also establishes that Onan assigns and responsibly directs the employees on a daily basis. Since the record shows that Onan has performed these functions without consulting with Riedel or anyone else, I find that he exercised independent judgment in performing these functions. Accordingly, I will exclude him from the unit found appropriate herein.

There are approximately three employees in the union found appropriate.ⁱ

240-0167-6700

260-3320-8700

401-7500

420-2900

420-7330

177-8520

177-8560

177-1650

Jurisdiction-Entity Relationships

Jurisdiction-Monetary Standards

Voter Eligibility-Statutory Exclusions

Unit- Other Scope/Definition

ⁱ At the hearing the Petitioner indicated its desire that the *Daniel* formula be used to determine voter eligibility pursuant to *Daniel Constr. Co.*, 133 NLRB 264 (1961) as modified in 167 NLRB 1078 (1967). Because the record demonstrates that the Employer is engaged in the construction industry, and the parties have not stipulated otherwise, the eligibility formula articulated in *Daniel Constr. Co.*, supra, and *Steiny & Co.*, 308 NLRB 1323 (1992), will apply. *Signet Testing Laboratories, Inc.* 330 NLRB 1 (1999).